APPEAL NO. 010030

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on December 7, 2000. The hearing officer determined that the appellant/cross-respondent (claimant) was not entitled to supplemental income benefits (SIBs) for the fourth and fifth compensable quarters because he did not make a good faith attempt to look for employment during the qualifying periods.

The claimant appealed, contending that he had a total inability to work pursuant to his doctor's reports and that a surveillance video does "not support an ability to work." The respondent/cross-appellant (carrier) appeals the hearing officer's finding on direct result and otherwise responds to the claimant's appeal, urging affirmance.

DECISION

Affirmed regarding the claimant's appeal. The carrier's appeal is untimely.

Although the carrier states in its appeal that it received the hearing officer's decision on December 21, 2000, records of the Texas Workers' Compensation Commission show that the carrier's representative signed for the decision on December 19, 2000, and, consequently, pursuant to Section 410.202, the carrier's appeal was required to be filed or mailed no later than Wednesday, January 3, 2001. The carrier filed its appeal by facsimile transmission on January 4, 2001, and, hence, it was untimely and will not be considered.

The parties stipulated that the claimant sustained a compensable (low back) injury on _____; that the claimant has an impairment rating (IR) of 15% or greater; that impairment income benefits (IIBs) have not been commuted; and that the qualifying period for the fourth quarter began on September 29, 1999, with the qualifying period for the fifth quarter ending on March 29, 2000. The claimant has not had surgery and a surveillance videotape taken on April 11, 2000 (about two weeks after the end of the fifth quarter qualifying period), showed the claimant using a lawn fertilizer spreader, carrying two large plastic trash cans at one time, and driving a pickup truck without any problem (the claimant said that he was giving himself home "therapy"). The claimant proceeds under a total inability to work theory.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). Rule 130.102(b) provides that an injured employee who has an IR of 15% or greater, and who has not commuted any IIBs, is eligible to receive SIBs if, during the qualifying period, the employee: (1) has earned less than 80% of the employee's average weekly wage as a direct result of the impairment from the compensable injury; and (2) has made a good faith effort to obtain employment commensurate with the employee's ability to work.

Rule 130.102(d)(3) for the fourth qualifying quarter and Rule 130.102(d)(4) for the fifth qualifying quarter provide that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work.

The carrier's appeal of the hearing officer's finding that the claimant's unemployment was a direct result of his impairment being untimely, the remaining SIBs criterion in dispute is whether the claimant attempted in good faith to obtain employment commensurate with his ability to work during the qualifying period. Section 408.142(a)(4); Rule 130.102(b)(2). The claimant contends that he had no ability to work during the qualifying period.

Although the hearing officer does not specifically reference Rule 130.102(d)(3) or (4) (as appropriate) she does make findings that inferentially address that rule. The hearing officer found that during the qualifying periods, the claimant "had an ability to work" thereby addressing the first element of Rule 130.102(d)(3) or (4). The hearing officer made no findings regarding whether there was a report from a doctor that specifically explains how the claimant's injury causes a total inability to work; however, our review of the evidence indicates there are reports dated November 21, 1999, and May 25, 2000, from Dr. W that might meet that criterion. The hearing officer refers to examinations by Dr. D in 1997 and on July 17, 2000, and Dr. L in 1998 which indicate that while the claimant could not return to his preinjury job as a heavy crane operator "he could at least return to some type of sedentary work" giving examples. The hearing officer further comments that a video taken of the claimant in April 2000 "confirmed some ability to work by Claimant." Dr. W's reports and the claimant's testimony support the hearing officer's finding that the claimant's condition has not changed in the last year.

The hearing officer was not persuaded that the claimant had shown he was unable to perform any type of work in any capacity during the qualifying periods. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer's decision is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert W. Potts
Appeals Judge